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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 30

LAWRASON RIGGS, JR., Special Guardian,

Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,

Respondents.

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK

BRIEF FOR RESPONDENT, HAROLD W. HASTINGS, SPECIAL GUARDIAN

HAROLD W. HASTINGS,
SYDNEY A. HELLENBRAND,
Counsel for Respondent Harold W. Hastings.

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No. 30

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK

BRIEF FOR RESPONDENT, HAROLD W. HASTINGS, SPECIAL GUARDIAN

This brief is submitted on behalf of those infants who constitute the remaindermen of the trust created by paragraph "Eighth" of the will of Josephine del Drago, deceased.

The Proceedings

The Last Will and Testament of Josephine del Drago was dated March 27, 1934 and was admitted to probate on April 6, 1938 (R. 15, 16, 32). In that will the testatrix,

among other provisions, made an outright bequest to her husband of $300,000 and created a trust in the sum of $200,000 for the life benefit of Marcel del Drago, with the remainder to the infants whom this special guardian represents. She also created a trust of the residue of her estate. The infant remaindermen of the latter trust are represented by Lawrason Riggs, Jr., as special guardian.

The executors herein brought on a proceeding for a voluntary accounting. The account reflected that the executors had paid approximately $230,000 on account of federal estate taxes (R. 24), and sought a determination of the apportionment of that tax pursuant to Section 124 of the Decedent Estate Law of New York (R. 18, 24).

Objections to an apportionment were filed on the ground that the provisions of Section 124 were unconstitutional and that therefore the payment of the federal estate tax was to be borne by the residuary estate and not by the legatees (R. 24, 28).

Thereafter, Surrogate Foley, in a decision reported in 175 Misc. 489, overruled these objections and ordered that the tax be apportioned pursuant to the provisions of Section 124 of the Decedent Estate Law (R. 55).

The application of Section 124 of the Decedent Estate Law frustrates the intent and wishes of the testatrix. She created in her Will a trust fund of $200,000 in which her stepson, Marcel del Drago was the life beneficiary and certain infants the remaindermen.

The effect of the statute is to reduce the corpus of this trust approximately 25%. Certainly it was not the intent of the testatrix that such an event occur.

An appeal was taken directly to the Court of Appeals of the State of New York, which court reversed the determination of the Surrogate (*Matter of del Drago*, 287 N. Y. 61) (R. 62).

This matter is before this court on a writ of certiorari which was granted on March 30, 1942.

The Question Involved

The sole issue to be determined is whether Section 124 of the New York Decedent Estate Law is contrary to and in conflict with legislation enacted by Congress dealing with federal estate taxes and, therefore, unconstitutional.

Summary of Our Contention

We shall urge that Congress in the enactment of the Federal estate tax law desired and intended that such taxes should fall upon the residuary estate and not upon the legatees or beneficiaries under a will. Indeed, Congress has so indicated by explicit provisions.

Section 124 of the Decedent Estate Law provides, in substance, that the federal estate tax shall be apportioned and prorated among the legatees and shall be paid by them.

The state legislation seeks to change the incidence of the tax imposed by Congress on estates of decedents. Such legislation is in direct conflict with the Supremacy Clause of the Constitution of the United States.

POINT I

Congress intended that the Federal Estate Tax shall fall upon and be borne by the residuary estate rather than the legatees.

The Federal Estate Tax is a levy upon the estate before distribution is made to the beneficiaries. It is not a tax upon the shares into which the estate is divided, nor is it a tax imposed upon a person's privilege of receiving property under a will. It is a tax upon the transfer of the estate at the time of death, upon the interest that ceases at death.

Edwards v. *Slocum*, 264 U. S. 61;
Y. M. C. A. v. *Davis*, 264 U. S. 47;
N. Y. Trust Co. v. *Eisner*, 256 U. S. 345;
Knowlton v. *Moore*, 178 U. S. 41.

It has been written wisely and with foresight that "These differences are not merely theoretical. They may carry practical consequences." (*Matter of Vanderbilt*, 281 N. Y. 297; affd. 309 U. S. 530.)

In *Knowlton* v. *Moore*, *supra*, this court considered the federal death tax then in existence. That law specifically provided that the tax levied shall fall upon and be borne by the legatees of the distributive shares. Obviously, that legislation was very similar to the provisions of Section 124 of the Decedent's Estate Law. The court in an elaborate opinion laid down and applied the rule that a tax upon a legacy is measured by the size of the estate rather than the size of the legacy, would cause "profound inequality". The court wrote:

> "The tax is on each separate legatee or distributive share, and the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legatees, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying * * * that the house of A, which is only worth $1,000, may be taxed, but that the rate of tax is to be determined by attributing to A's house the value of B's house, which may be one hundred fold the amount. The gross inequalities which must inevitably result * * * are readily illustrated. Thus, a person dying, and leaving an estate of $10,500, bequeathes to a hospital $10,000. The rate of tax would be 5%, and the amount of tax $500. Another person dies at the same time, leaves an estate of $1,000,000 and bequeathes $10,000 to the same institution. The rate of tax would be 12½% and the amount of the tax $1250. It would thus come to pass that the same person occupying the same relation, and taking in the same character two equal sums from two different persons, would be in one case more than twice the tax than he would pay in the other."

The opinion then levels the warning that the estate tax is outlawed if its burden is placed upon the persons receiving the specific shares. "It may be doubted", said Mr. Justice White,——

> "aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations

> arising from those fundamental conceptions of free government which underlie all constitutional systems."

Well aware of this decision the Congress in 1916 enacted the Federal Estate Tax.

Certainly, it is quite unreasonable to assume that the Congress exerting Federal power was legislating in disregard of existing doctrine, or to view its intention in the light of decisions which were not rendered until several years later (*Burnet* v. *Brooks*, 288 U. S. 378). Congressional legislation must be interpreted "in the light of the circumstances as they existed when the statute was passed" (*Louisville & Nashville Railroad Company* v. *Mottley*, 219 U. S. 467.)

In the enactment of the Federal Estate Tax, the Congress had the assistance of committees. Hon. Cordell Hull, the author of this legislation, made this statement (53 Cong. Rec., 64 Cong., 1st Sess., pp. 10656-7):

> "* * * The State Laws and the proposed Federal law, when considered as a combined tax measure, so supplement each other as to make the entire tax imposed by each more equitable than heretofore. The State laws have a rather high graduation on the shares of collaterals which the proposed measure does not impose. The States tax the smaller estates and shares thereof. The two systems taken together, therefore, do not conflict, but constitute a better rounded piece of fiscal legislation."

Likewise, the Legislative committee made similar remarks (House Rep. 922, 64 Cong., 1st Sess., p. 5):

> "Thirty States have laws imposing inheritance or share taxes both upon direct and collateral heirs.

> Twelve other States have laws imposing inheritance taxes upon collateral heirs. Your committee deemed it advisable to recommend a Federal estate tax *upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees.*"

Obviously, the Federal estate tax was not to fall upon the shares, as did the State Taxes.

The clear intent of Congress as to the incidence of the Federal Tax is reflected in the following statement by Mr. Hull (Cong. Rec., *supra*, p. 10657):

> "Under State share tax laws the estate is divided and subdivided, until the shares become so small that even very high rates afford but comparatively small and disappointing revenues. *Under the general laws of descent the proposed estate tax would be first taken out of the net estate before distribution,* and distribution then made under the same rule that would otherwise govern the estate. *Where a decedent makes a will he can allow the estate tax to fasten on the net estate in the same manner, or if he objects to this equitable method of imposing it upon the entire net estate before distribution he can insert * * * provision in his will, the effect of which would more or less change the incidence of the tax.*"

Congress was so deliberate and careful in its intention that the tax not be deemed a legacy tax falling upon the shares of beneficiaries, that it enacted another section which provides that where a person other than executor pays any part of the estate tax, such person shall be reimbursed out of the estate.

The statute is Section 826-b of U. S. C. A., which provides:

"Sec. 826-b. REIMBURSEMENT OUT OF ESTATE. If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced had the tax been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

The first portion of this statute clearly indicates the intent of Congress. It not only provides that the tax is to fall upon the residue and that the tax is not to fall upon the shares, but it provides for reimbursement and contribution so as to insure that the shares will not bear the tax.

The statute calls for "reimbursement" from the executor to one who has paid the tax and not contribution.

The courts which have considered section 826-b have consistently ruled that the Congress intended to place the tax upon the estate and not upon the beneficiaries and have refused to direct apportionment of the tax.

Matter of Oakes, 248 N. Y. 280;
Matter of Hamlin, 226 N. Y. 407.

In *Matter of Oakes, supra*, Mr. Justice Cardozo wrote:

"* * * The Federal tax, on the contrary, is laid upon the transfer of the estate as a whole and,

primarily at least, is a charge upon the residue. (Matter of Hamlin, 226 N. Y. 407) * * *.

"*The command of the statute is explicit as to the incidence of the burden.* 'If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the person whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate, * * * it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.' (40 Stat. 1096, 1100, c. 18, Sec. 408, Revenue Act of Feb. 24, 1919; *Farmers Loan & Trust Co. v. Winthrop, supra,* p. 497.) *The incidence of the burden, thus fixed by the statute in terms so unmistakable, has not been* modified by the will * * *"

In *Matter of Hamlin, supra.* the court wrote:

"The plain intent and obvious meaning of the act of Congress under consideration, especially when considered in connection with the facts surrounding the enactment of the same, indicate clearly, that the act imposed 'an estate tax' as distinguished from an inheritance tax, that the tax payable by the estate rather than by the legatees, * * *"

Indeed the constitutionality of this federal estate tax was sustained because this court stated the tax to be upon the residue and not upon the persons taking shares from the estate.

The case which sustains the tax is *New York Trust Co.* v. *Eisner*, 256 U. S. 345, where the court said:

> "The tax is not imposed upon them (the residuary legatees) but precedes them; and the fact that they may receive less or different sums because of the statute does not concern the United States."

This same principle was expounded by the court below (263 Fed. 620), which wrote:

> "The doubt as to validity expressed in that case (*Knowlton* v. *Moore*), was limited to measuring a tax upon the succession of each individual legatee to a specific legacy by the value, not of his legacy, but of the entire net estate of the decedent; it did not extend to the power of Congress expressly to impose an estate tax rather than a legacy tax,—*to measure it by the value of the net estate and to cast the burden upon the residuary personal estate.*"

Unquestionably, the Federal estate tax falls upon the residue and not upon the beneficiaries or their shares. Such was the will and intent of Congress.

Further proof of the intent of Congress is found in the history subsequent to the enactment of the Federal Estate tax law.

In 1918 and 1919 there was an attempt made to amend the tax law so as to remove the incidence of the tax from the residue and have the tax specifically fall upon the legacies. (65 Cong., 3rd Sess., H. R. Rept. No. 1037, pp. 70 *et seq.*) This attempt was unsuccessful.

A renewed proposal for substitution of a legacy tax in place of the Federal estate tax was made and rejected in 1921. (61 Cong. Rec., 67th Cong., 1st Sess., at pp. 6922, 5833-40.)

In 1924 another effort was made to substitute a legacy tax (65 Cong. Rec., 68 Cong., 1st Sess., pp. 8034 *et seq.*). One of the reasons for this proposal was stated to be that the incidence of the estate tax upon the residue was objectionable and not fair. This attempt was also rejected. A similar proposal was again made and rejected in 1935 (79 Cong. Rec., 74 Cong., 1st Sess., pp. 12301, 13074).

Only one change was made. In 1918 Section 826-c was added. This section provides that the tax attributable to proceeds of insurance policies should be apportioned among the beneficiaries of the insurance. It is a specific exception to the provisions of section 826-b. This exception warrants strict construction. As Chief Justice Rugg wrote in *Bemis* v. *Converse*, 246 Mass. 131 at page 134:

> "The presence of this provision indicates that no further apportionment was intended by Congress."

It is significant that it was Congress and not the State who made the change in the incidence of the tax on insurance proceeds. If Congress had no interest in who was to pay the estate tax, it never would have enacted Section 826-c.

POINT II

State legislation is without power to change, overrule or interfere with Federal legislation.

Such a situation is specifically prohibited by Article VI, clause 2 of the Constitution of the United States, which provides:

> "This constitution and the laws of the United States which shall be made in pursuance thereof • • • shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Unquestionably Congress has the power to lay and collect taxes on decedents' estate and to determine where those burdens should rest. Such acts of Congress are the supreme law of the land and state legislation, if in conflict with the federal law, is a nullity though enacted in the exercise of concurrent and not controverted powers (*Florida* v. *Mellon*, 273 U. S. 12, 17; *Gibbons* v. *Ogden*, 9 Wheat. 1).

It is obvious that the Federal estate tax law creates an independent and complete revenue system.

The statute requires the filing of a separate tax return. The federal authorities make their own determination of the property subject to tax and its value. The statute provides independent methods and machinery for the levy, enforcement and collection of the tax.

Every detail necessary to make it complete is present. The system needs no assistance from the States.

Such being the fact Congressional legislation and Congressional intent may not be overridden by State legislation. The exercise by Congress of federal powers is supreme.

In *Lake Shore & Michigan Rwy.* v. *Ohio*, 173 U. S. 285, this court held:

> "Where Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching the

matter, although such regulations may have been established in pursuance of a power not surrendered by the states to the general government."

The same principle is often stated as "the laws of the United States are the laws of the several states" (*Hines* v. *Lowrey*, 305 U. S. 85), and that such laws are "the laws of the individual states and of all the people of the United States" (*Erickson* v. *Macy*, 231 N. Y. 86).

It seems plain that there is actual conflict between the Federal law and Section 124 of the Decedent Estate Law.

The federal law regulates and fixes the incidence of the estate tax. It directs that it should fall upon the residue and that it should be paid therefrom by the executor. It makes express provision for reimbursement from the executor to any person who might have paid the tax or any portion thereof.

Section 124 of the Decedent Estate Law is to the contrary. It directs and commands that the executor, after payment of the estate tax, shall have reimbursement from the legatees—the very same persons who under federal law are entitled to restitution and reimbursement from the executor. In fact, the state permits an executor to withhold distribution of a legacy to assure a *pro rata* contribution of the estate tax.

Both statutes affect the sole and single question of who is to bear the burden of the federal estate tax. Congress has said that it is to be the residue and not the legatees, whereas, the State has said that it is to be the legatees and not the residue.

Obviously the state law cannot be reconciled and read in harmony with the federal law.

Certainly a State may not, under its power over devolution of property, burden legatees with a federal estate tax which Congress has commanded shall fall upon the residue of the estate and not upon the shares of the legatees.

Only Congressional permission, expressly given, can change the incidence of the Federal Tax.

This Court in *Burnet* v. *Harmel*, 287 U. S. 103, in determining whether certain payments were income, wrote:

> "Here we are concerned only with the • • • exercise of its plenary powers (of Congress) under the Constitution, to tax income. *The exertion of that power is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give uniform application to a nationwide scheme of taxation.* • • • *State law may control only when the operation of the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law.*"

Similarly, only Congressional permission expressly given, can authorize a state to interfere with a complete federal system.

This principle was laid down in *Farmers & Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29:

> "• • • The States can exercise no control over them (the national banks) nor in anywise affect their operation, except in so far as Congress may see proper to permit. • • • The States have no power, by taxation or otherwise, to retard, impede, burthen or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

Very interesting language is found in *Tarble's case*, 13 Wall. 397. There a State was denied the power to issue *habeas corpus* to question the detention of a person under federal right. The court wrote:

> "There are within the territorial limits of each State two governments * * * independent of each other and supreme within their respective spheres. Each has its separate departments, each has its distinct laws; and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other * * *. In their laws, and modes of enforcement, neither is responsible to the other. *How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, and by what officers * * * are matters subject* to their own control, and in the regulation of which neither can interfere with the other."

POINT III

Section 812-d, of the United States Internal Revenue Code cannot have any effect on the plain direction of Congress that the incidence of the basic estate tax shall fall on the residuary, as expressed in Section 826 of the said code.

The sentence, "If the tax imposed by Section 810, or any estate, succession, legacy, or inheritance taxes, are, either by terms of the will, by the laws of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deducti-

ble under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes * * *.", is a part of the paragraph of Section 812 called "d".

Such paragraph describes what charitable bequests are to be deducted from the gross estate so as to arrive at the net estate taxable. Similar language appears in Section 861, subdivision 3. It is apparently for the sole purpose of limiting the amount of deductions for charitable bequests and states that if a deduction from the gross estate is claimed because of a charitable bequest, that the amount of such deduction can only be the net amount of the legacy by whatever means such legacy is reduced.

Clearly, the use of such language as appears in those sentences can be no argument that Congress meant that the incidence of the tax shall be left to the individual states. All that can be claimed for them is that Congress recognized that on some occasions charitable bequests may be taxed and, if so, Congress wanted it made clear that no greater deduction could be allowed than the amount actually transferred to the legatee by such bequest.

Congress was not referring to the incidence of the tax in that section of the law. We repeat, all that Congress meant by that was that it recognized that the charitable bequest could be reduced in a number of ways and desired to make it clear that the only deduction allowed was the amount of the charitable bequest that was actually to be paid out.

Section 826 shows plainly where the incidence of the tax must fall. Sections 812, subdivision d, and 861, subdivision 3 do not change that intent. If Congress had intended that the incidence of the Federal tax could have been shifted by the States, Section 826 would certainly have been changed.

POINT IV

Hardships of the decision, if any, are not material.

The observations, statements and arguments in the petitioner's brief in regard to the hardship of the decision are, we respectfully submit, beside the point. No matter what hardship may be caused by such determination, it can have no weight in deciding a question of law. Both opinions of the Court of Appeals show that the issues and questions were thoroughly considered as was the practical effect of the decision.

Therefore, we do not feel that this argument need be further discussed other than to quote the following pertinent language from the Supreme Court of the United States in the case of *Crooks v. Harrelson,* 282 U. S. 55, page 60:

> "Laws enacted with good intentions, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the Courts."

CONCLUSION

Congress in the enactment of the Federal Estate tax fixed the incidence of the tax and made explicit provision that the burden shall fall upon the residue of the estate and not upon those receiving shares of the estate.

Section 124 of the New York Decedent Estate Law specifically alters and conflicts with the federal law in that it attempts to change the incidence of the federal estate tax and places the burden upon the legatees.

The order of the Court of Appeals of the State of New York and the order of the Surrogates' Court of New York entered on the remittitur of the Court of Appeals should be affirmed.

Dated: October 10, 1942.

Respectfully submitted,

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